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No. 90-615

In the Supreme Court of the United States

OCTOBER TERM, 1990

RAFAEL PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Court has directed the parties to address the following questions:

1. Does 28 U.S.C., Section 636, permit a magistrate to conduct the voir dire in a felony trial if the defendant consents?

2. If 28 U.S.C., Section 636, permits a magistrate to conduct a felony trial voir dire provided that the defendant consents, is the statute consistent with Article III?

3. If the magistrate's supervision of the voir dire in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the judgment is noted at 904 F.2d 34 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1990. A petition for rehearing was denied on July 11, 1990. Pet. App. 5a-6a. The petition for a writ of certiorari was filed on October 10, 1990, and was granted on January 22, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Article III of the United States Constitution, the relevant provisions of the Federal Magistrates Act, 28 U.S.C. 636, and Rules 51 and 52 of the Federal Rules of Criminal Procedure are reproduced in an appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiracy to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, one count of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of importation of heroin, in violation of 21 U.S.C. 952. The charges were based on petitioner's involvement in an effort to smuggle four kilograms of heroin from Thailand through J.F.K. International Airport in New York. Gov't C.A. Br. 3-9. The district court sentenced petitioner to a total term of 135 months' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-4a.

1. At a pretrial conference on October 14, 1988, the district court asked petitioner and his counsel whether they had "[a]ny objection to picking the jury before a magistrate." J.A. 2. Petitioner's counsel replied, "I would love the opportunity." *Ibid.* On January 6, 1989, the magistrate to whom jury selection had been assigned again asked petitioner's counsel whether "I have the consent of your client to proceed with the jury selection." Petitioner's counsel replied: "Yes, your Honor." *Id.* at 5. The magistrate

then proceeded to conduct the jury voir dire and to supervise the selection of the trial jurors.

After the jury was selected but before it was sworn, the parties met with the district court to discuss any unresolved pretrial matters. Petitioner did not object at that time to the magistrate's role in selecting the jury or to any specific ruling made by the magistrate during jury selection. J.A. 6-9.[1] It was not until petitioner filed post-conviction motions in the district court that he first complained about the magistrate's role in selecting the jury.

2. On appeal from his conviction, petitioner argued that it was error for the district court to assign the jury voir dire to a magistrate. He claimed that reversal of his conviction was required by this Court's decision in *Gomez* v. *United States*, 490 U.S. 858 (1989), which held that the Magistrates Act does not authorize district courts to delegate jury selection in felony cases to magistrates and that the supervision of jury selection by a magistrate was not subject to harmless error analysis.

The court of appeals affirmed. Pet. App. 1a-4a. Relying on prior Second Circuit decisions, the court of appeals held that petitioner's explicit consent to the magistrate's supervision of jury selection waived his right to raise that issue as a basis for obtaining reversal of his conviction.

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[1] The magistrate's conduct of the voir dire was routine; there were only two points during the jury selection process on which there was any dispute between the parties at all. First, the magistrate excused one juror for cause over petitioner's objection. Jan. 6, 1989, Tr. 26. Second, the magistrate sustained petitioner's objection to one of the voir dire questions that the government had submitted. *Id.* at 4-6. (Petitioner has lodged the transcript of the jury voir dire with the Clerk of this Court.)

SUMMARY OF ARGUMENT

This is a waiver case. Petitioner argues at some length that permitting the magistrate to select the jury in this case was error. We agree with him that assigning jury selection to a magistrate is error even if, as in this case, it is done with the consent of the parties. The question on which issue is joined in this case is whether petitioner's failure to invoke his right to have a district court conduct voir dire bars him from obtaining relief.

The district court asked whether petitioner would consent to have the magistrate preside over jury selection. His counsel responded, "I would love the opportunity." The jury selection process was uneventful, and petitioner did not raise an objection before the district court to anything that the magistrate did in the course of jury selection. Thus, from all that appears, petitioner was not only satisfied with having the magistrate conduct jury selection, but preferred that option. It was not until after his conviction that petitioner reversed field and complained that the magistrate's role in jury selection was such fundamental error that, in spite of petitioner's enthusiastic acquiescence in the procedure, his conviction had to be voided and a new trial granted.

The court of appeals properly affirmed the conviction in this case on the ground of waiver. Petitioner could have answered "yes" when the district court asked whether he would object to having the magistrate play any role in jury selection, and if he had done so the court presumably would have conducted the jury selection itself. If the district court had assigned the voir dire to the magistrate over petitioner's objection, petitioner would have had a right to a new trial. See *Gomez* v. *United States*, 490

U.S. 858 (1989). Petitioner, however, did not object to the course of action proposed by the district court, apparently because he preferred having the magistrate conduct the voir dire, or at least was indifferent as to whether the voir dire was conducted by the magistrate or the district court. A third possibility, of course, is that petitioner's counsel hoped that the district court would assign jury selection to the magistrate so that it would seed potential reversible error into the proceedings.

There are sound reasons why a defendant would not object to, or would even welcome, having a magistrate conduct the voir dire. A particular magistrate may be more willing than the district judge to ask wide-ranging voir dire questions, may give the attorneys more leeway in conducting the jury selection process, or may have a reputation for being more willing to grant defense challenges for cause or less willing to grant challenges raised by the prosecution. Because petitioner expressed his preference for having the magistrate conduct the voir dire, and because there are valid reasons why he might have done so, he should be held to his choice. To grant a defendant a new trial in this situation would result in an unjustified windfall to a defendant who got exactly what he asked for at trial.

None of the grounds that petitioner advances is sufficient to excuse his failure to object to the magistrate-conducted voir dire in this case. First, the error is not "plain error" within the meaning of Rule 52(b), Fed. R. Crim. P., because there is no indication that the assignment of jury selection to the magistrate resulted in a miscarriage of justice in this case or seriously affected the integrity or public reputation of the judicial proceedings. Although this Court in *Gomez* held that the error of assigning voir

dire to a magistrate is not subject to harmless error analysis, that does not mean that it is always plain error. Because a defendant may have very sound reasons for wanting to have his jury selected by a magistrate, there is no reason to apply plain error principles, which are designed to avoid miscarriages of justice, to a case where the defendant chose the very course that the court followed.

Second, the *Gomez* Court's statement that a magistrate lacks "jurisdiction" to conduct jury selection refers to the magistrate's lack of authority to select a jury. It does not suggest that by assigning jury selection to a magistrate, the district court somehow loses subject matter over the cause before it and therefore loses the power to issue a binding judgment in the case.

Third, nothing in Article III of the Constitution requires reversal here. The assignment of jury selection to a magistrate, although violative of the Magistrates Act, did not also violate Article III. The magistrate served as an adjunct to the district court, subject to the court's close direction and control. If the parties had regarded the magistrate's performance as flawed in any respect, there were a variety of ways that the district court could have reviewed and corrected the magistrate's error, either by screening any disputed voir dire questions in advance, by interrupting the voir dire to make requested rulings, or, if necessary, by conducting part or all of the jury selection process anew. None of these devices was used, because none was needed. The fact that the parties were apparently quite content with the magistrate's work and therefore saw no reason to complain about the process is not evidence that the magistrate's performance was unreviewable and therefore fell outside the sphere of responsibilities that can constitutionally

be performed by an "adjunct" officer in aid of an Article III court.

Even if Article III grants a defendant the right to have a district court select the jury in a felony case, petitioner waived that right in this case. This Court has held that principles of waiver by the parties are not dispositive in the case of a violative of the "structural" component of Article III, *i.e.*, the protection against encroachments on the authority of the Judicial Branch in contravention of Article III. Waiver is fully applicable, however, when it is the "individual right" component of Article III that is at issue, *i.e.*, the right to adjudication by an independent officer enjoying tenure and salary protections. In this case, only the individual right component of Article III is at issue; the structural component of Article III is not involved, because the permissive delegation of responsibilities to a magistrate is entirely within the Judicial Branch and is subject to the discretion of the district court judge in each case.

Finally, petitioner's waiver of his right to have the district court preside over jury selection was valid, even though the consent to magistrate-conducted voir dire was given by petitioner's attorney, rather than by petitioner personally. Only a few trial rights are considered so fundamental that their waiver is invalid unless the waiver is made personally and intelligently. Those include basic rights such as the right to counsel, the right to go to trial, and the right to a trial by jury. Other trial rights, including rights of compulsory process and confrontation, rights to exclude illegally obtained evidence, and rights under the Rules of Evidence, are subject to waiver through the defendant's attorney and do not require a personal and intelligent waiver on the record from the defendant. The right in this case is not like the

fundamental and sweeping rights that can be waived only by the defendant himself, but is more akin to the standard trial rights that are routinely waived through the action or inaction of the defendant's counsel acting on his behalf.

ARGUMENT

I. THE MAGISTRATES ACT DOES NOT AUTHORIZE A DISTRICT COURT TO DELEGATE JURY SELECTION TO A MAGISTRATE IF THE DEFENDANT CONSENTS TO THAT DELEGATION

In *Gomez* v. *United States*, 490 U.S. 858 (1989), this Court held that the Magistrates Act, 28 U.S.C. 636, does not authorize magistrates to conduct jury selection in felony criminal cases over a defendant's objection. The Court pointed out that Act's "carefully defined grant of authority [to magistrates] to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Gomez*, 490 U.S. at 872. In addition, the Court noted that the Act contains no provisions for court review of a magistrate's decision during jury selection; the Court concluded that "it is unlikely that [Congress] intended to allow a magistrate to conduct jury selection without procedural guidance or judicial review," *id.* at 873, provisions not found in the Act.

In *Gomez*, the Court framed the issue before it as "whether presiding at the selection of a jury in a felony trial without the defendant's consent" is among the duties that the Magistrates Act empowers magistrates to perform. 490 U.S. at 860. Accordingly, the holding of *Gomez* extends only to cases in which the district court delegated jury selection to a magistrate over the defendant's objection. See, *e.g.*, *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1545 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990). Nevertheless, in light of the Court's analysis of the text and legislative background of the Act, we agree with petitioner (Br. 10-12) that *Gomez* forecloses the argument that the statute may be read to authorize magistrate-conducted voir dire when the defendant consents. The Magistrates Act, as construed by this Court, does not give magistrates the power to preside over jury selection. A defendant's consent cannot supply the statutory authority Congress did not provide.[2]

Because we agree with petitioner that the Magistrates Act does not authorize a magistrate to conduct felony voir dire on the defendant's consent, we have no occasion to discuss the second question that the Court directed the parties to address—whether the Magistrates Act violates Article III if it is construed to authorize a magistrate to conduct felony voir dire with the defendant's consent. In the course of our discussion of the waiver issue, however, we will address a related question, *i.e.*, whether the assignment of jury voir dire to the magistrate in this case violated Article III and, if so, whether the violation resulted in a jurisdictional defect in the proceedings that requires reversal of petitioner's conviction in spite of his consent to the procedure employed. We argue that there was no violation of Article III in

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[2] For that reason, we disagree with the Third Circuit's analysis in *Government of the Virgin Islands* v. *Williams*, 892 F.2d 305 (1989), where that court concluded that "the assignment of voir dire to a magistrate on consent of the defendant * * * plainly qualifies as an 'additional duty' for purposes of [28 U.S.C. 636(b)(3)]." 892 F.2d at 311; see Pet. Br. 11-12. We agree with the result in *Williams*, however, because the consent to the magistrate's role in selecting the jury constitutes a waiver of the defendant's right to raise that claim on appeal, for the reasons set forth in part II of this brief.

this case and that even if there was, petitioner waived his Article III claim when he agreed to have the magistrate conduct the jury selection in his case.

II. PETITIONER FORFEITED THE RIGHT TO HAVE A JUDGE PRESIDE OVER VOIR DIRE BECAUSE HE AGREED TO THE MAGISTRATE'S ROLE IN SELECTING THE JURY

Petitioner concedes that he did not raise any objection in the trial court to having the magistrate conduct the jury voir dire. Indeed, petitioner's counsel told the district court that he "would love the opportunity" to have the magistrate preside over voir dire. J.A. 2. Moreover, the magistrate to whom jury selection was assigned later asked petitioner's counsel whether "I have the consent of your client to proceed with the jury selection." Petitioner's counsel replied affirmatively. *Id.* at 5. Having enthusiastically acquiesced in the magistrate's role in jury selection, petitioner may not now raise that issue as error and obtain a new trial.

Principles of waiver ordinarily do not permit a party to withhold objection to a particular procedure and then seek reversal on the ground that the procedure was improper. It thus follows that waiver principles do not allow a party to request or specifically agree to a particular procedure and then argue on appeal that the use of the agreed-upon procedure was unlawful, requiring that the party be granted a new trial. Those principles are well established because they serve the important goal of orderly trial procedure and because they are commonsense applications of a rule of basic fairness: a party may not lure the court into error and then seek reversal because the court did precisely what the party requested.

A. Ordinary Principles Of Waiver And Invited Error Require That Petitioner Be Denied Relief

1. *A defendant must object to a ruling at trial in order to preserve an objection for appeal*

"No procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as in civil cases by failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord *United States* v. *Frady*, 456 U.S. 152, 162 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). The principle providing for the forfeiture of legal claims in the absence of a contemporaneous objection is embodied in Federal Rule of Criminal Procedure 51. An error is presented under that Rule only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court." *Hill* v. *United States*, 261 F.2d 483, 489 (9th Cir. 1958).[3]

This Court has applied the contemporaneous objection rule in a variety of contexts.[4] For example,

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[3] Rule 51 excuses the lack of an objection if "a party has no opportunity to object to a ruling or order." Here petitioner and his counsel were fully aware of the trial court's delegation of jury selection to a magistrate, and they were not prohibited from making a timely objection to the procedure. To the contrary, petitioner's counsel was twice specifically asked if he wished to consent to the procedure and twice expressly stated that he did. J.A. 2, 5.

[4] Strictly speaking, Rule 51 sets forth a rule of forfeiture, not waiver, although the courts occasionally speak in terms of a defendant's "waiver" of a legal claim. See Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DePaul L. Rev. 753, 757-758 (1980). The term "waiver"

in *United States* v. *Gagnon*, 470 U.S. 522 (1985), the district court held a conference in chambers outside the presence of the defendants. The defendants did not object, but on appeal they argued that the district court had violated their right under Federal Rule of Criminal Procedure 43(a) to be present at all stages of a criminal trial. This Court held that the defendants had forfeited their rights under Rule 43 because "[n]o objections of any sort were lodged." 470 U.S. at 528. Likewise, in *Levine* v. *United States*, 362 U.S. 610 (1960), the Court ruled that the defendant had forfeited any due process right to a public trial by not asking the district judge to open the courtroom. *Id.* at 619; see also *Segurola* v. *United States*, 275 U.S. 106, 111-112 (1927) (Fourth Amendment challenge to the seizure of evidence was forfeited in the absence of a timely motion to suppress); 3A C. Wright, *Federal Practice and Procedure: Criminal 2d* § 842, at 287 (2d ed. 1982) (requirement that defendant object and express his preference applies to "all kinds of rulings at the trial").[5]

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often connotes the intelligent and knowing relinquishment of a right. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The forfeiture principle in Rule 51, by contrast, does not depend on the defendant's state of mind when he failed to raise an issue in the trial court. See *United States* v. *Gagnon*, 470 U.S. 522, 527-528 (1985); *Wainwright* v. *Sykes*, 433 U.S. 72, 82-91 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 & n.3 (1976).

[5] The courts of appeals have consistently held that defendants forfeit statutory and constitutional rights if they fail to make an objection, unless the forfeiture results in a miscarriage of justice. See, *e.g.*, *United States* v. *Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987) (forfeited *ex post facto* argument); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (forfeited double jeopardy defense), cert. denied, 472 U.S. 1017 (1985); *United States* v. *Coleman*, 707 F.2d 374, 376 (9th Cir.) (forfeited Fifth Amendment claim), cert. denied, 464 U.S. 854 (1983).

The reasons that a defendant must make his views known to the trial court are familiar ones. First, the requirement promotes judicial economy. See *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977); 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.5, at 251 (1984). If the issue is raised in the trial court, the trial judge may be able to resolve the matter to the defendant's satisfaction. See *United States* v. *Gagnon*, 470 U.S. at 529. Or the prosecutor might decide to forgo a particular course of conduct in order to eliminate the possibility of inserting a reversible error into the record. See generally *Luce* v. *United States*, 469 U.S. 38, 42 (1984). In either case, a contemporaneous objection would eliminate the need for an appellate reversal and a second trial on the same charges.

Second, the contemporaneous objection rule requires the parties to declare themselves as to the action they want the court to take. As a matter of basic fairness, a defendant should not be able to pursue a certain course at trial for tactical reasons and, if convicted, later claim that the course followed by the court was reversible error. See 3 W. LaFave & J. Israel, *supra*, at 251; see also *Wainwright* v. *Sykes*, 433 U.S. at 89.

This Court in *Wainwright* v. *Sykes* summarized the importance of the contemporaneous rule when it described a criminal trial:

> A defendant has been accused of a serious crime and this is the time and place set for him to be tried by a jury of his peers and found either

> guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

433 U.S. at 90.

2. The contemporaneous objection rule should be applied in this case

This case presents compelling reasons for applying the contemporaneous objection rule. Here, the Court can be confident that petitioner was happy to have the magistrate conduct the voir dire. Petitioner's counsel—in petitioner's presence—expressly agreed to have the magistrate preside over jury selection. J.A. 2. That tactical decision is readily understandable. Counsel may have believed that the magistrate would conduct a more thorough voir dire than a district judge, who might be distracted by other matters. Counsel may have concluded that the magistrate would be more amenable to the urging of counsel to ask particular questions of the prospective jurors or to permit counsel to play a greater role in voir dire proceedings. Or, counsel may have believed that the magistrate would be more willing than the district judge to grant for-cause challenges

to prospective jurors.[6] Counsel may even have agreed to the procedure because he hoped that the use of a magistrate, rather than a district judge, would create an error in the proceedings that could be raised if petitioner were convicted. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). To relieve counsel of the obligation to object allows the defendant to have the best of both worlds: the procedure the defendant prefers at the trial level, and a potentially winning argument on appeal if the case turns out badly. See *Wainwright* v. *Sykes*, 433 U.S. at 89; *Estelle* v. *Williams*, 425 U.S. 501, 508 (1976); *id.* at 515 (Powell, J., concurring).

Petitioner tries to gloss over his agreement to proceed with magistrate-conducted voir dire with the following excuse:

> In fact, prior to petitioner's trial, the second circuit held that a defendant had no statutory or constitutional right to the presence of the district judge at felony *voir dire*, *see United States v. Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez v. United States*, 109 S. Ct. 2237 (1989), and it was the "practice . . . in this circuit" to override a defendant's objection to assignment of this function to a magistrate, *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990).

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[6] Indeed, in this case, the magistrate sustained defense counsel's only substantive objection to the government's proposed voir dire questions. Jan. 6, 1989, Tr. 4-6. After the completion of the magistrate-conducted voir dire, the district court asked petitioner and the government about any "outstanding matters." J.A. 7. Neither then nor at any other time did petitioner's counsel complain about the magistrate's supervision of the jury selection or the qualifications of the jurors selected or excused during voir dire.

Br. 2-3; see *id.* at 47-49. But that is no excuse at all. The absence of an enforceable *right* to have the court conduct jury selection does not mean that the court was *required* to assign jury selection to a magistrate. Second Circuit law at the time of the trial authorized the court to assign jury selection to a magistrate; but it certainly did not compel that course of action. Thus, if petitioner did not want to have a magistrate select the jury, he had every reason to object to that procedure—both because the procedure might be struck down by this Court, as it later was,[7] and because the district court was free to honor petitioner's request and conduct the jury selection itself. Indeed, if the court had no intention of respecting petitioner's choice, it is difficult to explain why the court bothered to ask whether petitioner had "[a]ny objection to picking the jury before a magistrate," J.A. 2, and why the magistrate followed up by asking petitioner and his counsel whether the magistrate "had the consent of your client to proceed with the jury selection," *id.* at 5.[8] Moreover, even if petitioner's

[7] At the time of the jury selection in this case, the petition in the *Gomez* case had been filed, and the United States had acquiesced in the petition. In addition, the Fifth Circuit en banc had held that it was error to assign jury selection to a magistrate over the defendant's objection. See *United States* v. *Ford*, 824 F.2d 1430 (1987), cert. denied, 484 U.S. 1034 (1988).

[8] Petitioner states that it was the practice in the Second Circuit at the time to override a defendant's objection to the assignment of voir dire to a magistrate (Br. 2-3). But the district judge in this case did not simply override an objection, he solicited the defendant's views on the question. Likewise, the magistrate questioned counsel to ensure that the magistrate had petitioner's consent to act before beginning the jury selection process. The conduct of both the district court and

explanation for his conduct in the district court could excuse his failure to object to the court's proposal to assign jury selection to the magistrate, it does not account for his expression of preference for that procedure. In short, petitioner's current suggestion that he simply acquiesced, albeit reluctantly, in the inevitable is flatly at odds with his performance in the district court and should not be credited for that reason.

3. *The "invited error" doctrine applies in this case*

Because petitioner eagerly embraced the proposal to have the magistrate conduct the voir dire, this case is governed by the "invited error" doctrine. Under that doctrine, a defendant who requests or expressly agrees to a particular procedure forfeits the right to claim on appeal that the district court erred in using that procedure, even more conclusively than does a defendant who merely fails to object.

The rationale behind imposing an especially stringent standard for review of invited errors is that where a party has expressly agreed to a particular course of action, the court and the opposing party should be entitled to assume that any possible objection to that course of action has been abandoned. In addition, in cases in which the defendant or his counsel have requested or embraced a particular ruling, there is no risk that the defendant has been prejudiced by an oversight on the part of his attorney. Rather, it is clear that the defense has adverted to the issue and made a tactical choice with respect to it. Absent the most extreme circumstances, the defendant should be held to that choice.

the magistrate is quite inconsistent with an intention to assign jury selection to the magistrate regardless of what petitioner said in response to their inquiries.

See, *e.g.*, *United States* v. *Eagle Thunder*, 893 F.2d 950, 953 & n.2 (8th Cir. 1990) (defendant could not challenge jury instruction he had requested); *United States* v. *Prince*, 883 F.2d 953, 961-962 (11th Cir. 1989) (defendant could not challenge admission of hearsay elicited on cross-examination, where that questioning resulted from his direct examination); *United States* v. *Vachon*, 869 F.2d 653, 658-659 (1st Cir. 1989) (defendant could not complain about admission of evidence where he elicited inadmissible testimony); *United States* v. *Rodriguez-Cardenas*, 866 F.2d 390, 395-396 (11th Cir. 1989) (defendants could not question absence of limiting instruction where "they made a strategic decision" at trial not to request one); *United States* v. *Oppon*, 863 F.2d 141, 145-146 & n.9 (1st Cir. 1988) (defendant could not challenge evidence he elicited at trial without objection). As in those cases, petitioner's affirmative endorsement of the magistrate's role in selecting the jury should bar him from obtaining reversal of his conviction, even if the Court believes that in the circumstances of this case a simple failure to object would not have that effect.

B. The Error In This Case Is Not "Plain Error" Or Otherwise Non-Waivable

Petitioner seeks to avoid this straightforward application of the contemporaneous objection and invited error doctrine by arguing that this Court in *Gomez* adopted a rule of automatic reversal whenever jury selection is delegated to a magistrate. This contention amounts to an argument that the assignment of jury selection to a magistrate is a "plain error" that is reviewable even in the absence of an objection. See Fed. R. Crim. P. 52(b).

1. *The "plain error" doctrine is inapplicable here*

The plain error rule set forth in Rule 52(b) permits a court to review "plain errors or defects affecting substantial rights" even in the absence of an objection by the party. The rule is a narrow exception to the contemporaneous objection rule, one that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). It should be invoked "to correct only 'particularly egregious errors,' those that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted). To satisfy this standard, a reviewing court ordinarily must "find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact" on the trial. *Id.* at 17 n.14.

Petitioner never suggested in the district court that the magistrate's handling of jury selection was inadequate, and even now his only complaint about the jury selection process is that one potential juror was excused for cause after he gave an equivocal answer to the question whether he would follow the court's instruction about constructive possession of drugs. See Jan. 6, 1989, Tr. 26. That ruling, however, was manifestly correct and could not have affected petitioner's right to an unbiased jury.[9]

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[9] The juror in question told the magistrate that a close friend of his had been convicted of purchasing cocaine and that he felt his friend "got a raw deal" because he was charged with possessing drugs that belonged to someone else. Jan. 6, 1989, Tr. 22-23. When the magistrate asked the juror whether, in light of his friend's experience, he would have any hesitancy in following the court's instructions on con-

There are, of course, limits to the extent to which a court may delegate criminal trial functions to unauthorized persons. Even if it were done without objection from the parties, delegating to a visiting high school civics class the task of ruling on objections, instructing the jury, and imposing sentence would be plain error, since such a flagrant departure from traditional procedures would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). But the same cannot fairly be said of the assignment of magistrates to conduct jury voir dire. Magistrates are judicial officers who perform a variety of functions in aid of Article III judges, including, with the consent of the parties, conducting civil and misdemeanor criminal trials. See 18 U.S.C. 3401; 28 U.S.C. 636(b) and (c). While we now know that magistrates are not authorized to conduct felony jury selection, that degree of participation by a magistrate in felony trials is not so incongruous or inconsistent with common notions of procedural regularity as to undermine the integrity and public reputation of the federal criminal courts.

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structive possession, the juror said, "Well, if there is any relationship to that, I don't know what comes out of this. If there is any relationship to that, I may go back to it." *Id.* at 26. The magistrate concluded that the juror had in effect "suggested to me that he'll not admit to following the instructions of the Court." *Ibid.* The decision to excuse that juror for cause was perfectly appropriate, and it is hardly surprising that petitioner's counsel made nothing further of the point before the district court.

2. An error is not necessarily plain simply because a court has held that the error can never be harmless

The Court in *Gomez* held that the delegation of jury selection to a magistrate can never be dismissed as harmless error, see Fed. R. Crim. P. 52(a). *Gomez*, 490 U.S. at 876. The Court's determination that a *Gomez* error can never be harmless within the meaning of Rule 52(a) does not, however, mean that such an error is always "plain" within the meaning of Rule 52(b).

The doctrines of harmless error and plain error protect different interests. The harmless error rule protects rulings in criminal cases from attack on inconsequential grounds and therefore ordinarily requires a reviewing court to find prejudice to the defendant before overturning the ruling in question. The plain error rule has the dual function of protecting the process of adjudication at trial by requiring the defendant to make his wishes known with respect to a particular ruling, and at the same time protecting against the risk that a defendant will be unjustly convicted because of a serious default on the part of his attorney.

Because of the different policies served by the two doctrines, an error that is non-harmless is not necessarily "plain." An error will be found harmless only if a reviewing court has great confidence that the error did not materially affect the verdict. In order to rise to the level of plain error, however, an error must have a more demonstrable effect on the verdict, since the concern for the fairness of the proceedings must be balanced against the strong policy interests requiring a claim of error to be brought to the atten-

tion of the district court in time for the error to be avoided or corrected.

The Court has identified several classes of errors that are not subject to harmless error analysis.[10] But that does not mean that such an error must result in reversal if the defendant fails to call it to the district court's attention. A ruling that harmless error analysis is inapplicable to a particular error rests on the difficulty of assessing whether the practice at issue causes prejudice, not on the conclusion that the practice results in prejudice to the defendant in every case. See *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). Thus, the Court's decision in *Gomez* that harmless error analysis does not apply when a magistrate picks a jury does not mean that petitioner was prejudiced by the magistrate's role at his trial. By contrast, the plain error standard requires a showing of substantial prejudice, which petitioner cannot make.[11]

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[10] See, *e.g.*, *Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion) (appointment of a prosecutor with a financial interest in the outcome creates an appearance of impropriety and has effects on the prosecution that are difficult to assess); *Rose* v. *Clark*, 478 U.S. 570, 578 (1986) ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from the grand jury strikes at fundamental values of our society and does not lend itself to harmless error analysis).

[11] The courts of appeals that have considered the relationship between the harmless error and plain error standards have suggested that a finding of plain error ordinarily requires a greater showing of prejudice than is necessary to avoid a finding of harmless error. See *United States* v. *Thame*, 846 F.2d 200, 207 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985). That is particularly so with respect to constitutional errors, which cannot be excused under the harmless error doctrine unless the errors are harmless beyond a reasonable doubt.

The distinction between harmless error and plain error analysis is clearest with respect to errors that have the potential to be highly prejudicial but which the defendant, in particular settings, may wish to let pass, or even welcome. An erroneous ruling cannot be considered plain error where the defendant may have good reason not to resist it.

An example from the arena of Eighth Amendment law may illustrate this point. In *Turner* v. *Murray*, 476 U.S. 28 (1986), the Court adopted a per se rule that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The Court's rule apparently would not allow a finding of harmless error in any case in which the defendant requested the inquiry. Because it recognized that defense counsel might prefer not to broach the subject of racial prejudice, however, the Court held that the defendant would be entitled to the inquiry only upon request. *Id.* at 37 & n.10. Thus, omission of the inquiry upon request could not be harmless error; if the defendant made no request, however, the omission would not constitute plain error.

The legal issue presented in this case is closely analogous. The fact that harmless error principles do not apply to a *Gomez* error does not mean that a defendant should be free to raise such an error on appeal without having preserved an objection in the district court, particularly where, as here, the defendant expressly chose to proceed with magistrate-conducted voir dire.

Petitioner evidently had reasons to prefer the procedure employed at trial. And there is no reason to question the wisdom of petitioner's choice. Unlike many situations involving rulings that are almost certainly unfavorable to the defendant, the assignment of voir dire to a magistrate is not inherently more likely to help the prosecution than the defense. This issue is therefore one in which the absence of objection is best explained not by oversight, but by tactical preference or indifference. In our view, it makes little sense in such a case to adopt a rule of automatic reversal, regardless of the position taken by the defendant in the district court.

3. *The magistrate's lack of "jurisdiction" to conduct voir dire does not render the assignment of voir dire to the magistrate plain error*

Petitioner argues that the Court in *Gomez* in effect held error of the sort in this case to be cognizable under the plain error rule, because it characterized the error as relating to "jurisdiction." See *Gomez*, 490 U.S. at 876 (referring to "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to proceed"). The Court's use of the word "jurisdiction" in *Gomez*, however, does not advance petitioner's plain error argument.

The word "jurisdiction" is a "many-hued term." *United States* v. *Wey*, 895 F.2d 429, 431 (7th Cir.), cert. denied, 110 S. Ct. 3283 (1990). As the Seventh Circuit noted in *Wey*, "*Gomez* used the word 'jurisdiction' in a context revealing that the court meant 'authority.'" 895 F.2d at 431. That is, the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See also

United States v. *Rodgers*, 466 U.S. 475, 479-480 (1984) (defining "jurisdiction" in 18 U.S.C. 1001 to mean "official, authorized functions"); cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional").

As petitioner acknowledges (Br. 40), the district court did not lose subject matter jurisdiction over this case by erroneously delegating jury selection to a magistrate. Subject matter jurisdiction is lacking when the court cannot issue a binding judgment on the subject. *Insurance Corp.* v. *Campagnie des Bauxites*, 456 U.S. 694, 701 (1982); Restatement (Second) of Judgments § 11 (1982). There is no doubt in this case that the district court had jurisdiction to adjudicate the charges against petitioner and enter a judgment against him. See 18 U.S.C. 3231. Whether the district judge or the magistrate presided "during jury selection does not affect the court's subject-matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving this dispute." *United States* v. *Wey*, 895 F.2d at 431; accord *United States* v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990); see generally *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986). Accordingly, the trial court's error in delegating jury selection to a magistrate was not a "jurisdictional" error of the sort that may be raised at any time (or noted by the court *sua sponte*) and requires reversal of the judgment whenever it is noticed.

C. Article III Does Not Require That Petitioner Be Granted Relief In Spite Of His Consent To The Magistrate's Role In Selecting The Jury

Petitioner makes a two-part argument with respect to Article III of the Constitution. First, he argues that magistrate-conducted voir dire violates Article III, because it delegates the "judicial Power" to an officer who does not enjoy the tenure and salary protections of an Article III judge. Second, he argues that a violation of Article III, at least in the present context, constitutes automatic reversible error and is not subject to waiver. We believe that petitioner is wrong on both portions of his argument. If he is to prevail, however, he must be correct on both contentions.

At the outset, it is important to note the breadth and implications of petitioner's position. If petitioner is correct in his view of the restrictions imposed by Article III on the use of magistrates, far more is at stake than magistrate-conducted voir dire in felony jury trials. The authority of magistrates, on consent, to conduct misdemeanor trials or even to conduct voir dire in misdemeanor cases would be at risk, since nothing in Article III distinguishes between misdemeanors and felonies. Moreover, while petitioner refrains from questioning the validity of the waiver of the right to trial by an Article III judge in civil cases, see Br. 34-35 n.19, he provides no analytical basis for applying different set of principles in civil and criminal cases.[12] Article III does not define the "judicial

[12] The following example may show how contrived is petitioner's effort to distinguish between felony cases and all other types of federal judicial proceedings. Suppose a criminal defendant was charged in the same indictment with both felonies and misdemeanors. Suppose further that the defendant consented to have his jury selected by a magistrate. Under petitioner's view, it would appear that the defendant would be entitled under Article III to have his felony counts reversed, but would have his misdemeanor counts upheld, even if the sentences imposed on both sets of counts were identical, and even though the same jury heard the evidence and returned verdicts on both sets of counts.

Petitioner asserts that the distinction between felony cases and all others is justified by the greater importance of felony cases and the fact that Article III guarantees a right to a jury trial in felony cases. The jury trial right, however, has nothing to do with whether particular cases are within the "judicial Power." In any event, the line between felonies and misdemeanors is different from the line between cases in which a jury trial is available and those in which it is not. Moreover, petitioner's effort to invoke the relative "importance" of felony prosecutions is an entirety unsatisfactory basis for distinguishing between cases in which magistrates may participate in trials by consent and those in which they may not. Besides the absence of any textual basis for such a "standard," the amorphous nature of the "importance" test is an invitation to chaos. It is certainly possible to imagine civil cases that are more important to the parties, and to the community as a whole, than some felony cases might be, yet petitioner contends that because of the importance generally attached to felonies, Article III *never* permits a magistrate to conduct jury selection in a felony case, while it *always* permits a magistrate to conduct jury selection, with consent, in misdemeanor and civil cases.

Power" differently for felony cases than for all other proceedings that fall within federal jurisdiction. Magistrates participate in or try a large number of misdemeanor and civil cases each year,[13] and in those cases the magistrates typically do not just select the juries, but conduct the full trials. It is hard to say,

[13] Petitioner cites statistics showing that in the year ending July 30, 1990, magistrates tried 4,958 civil cases and 13,248 misdemeanor cases, and disposed of an additional 87,682 petty offense cases. Pet. Br. 36.

therefore, that district courts exercise "meaningful review" of the magistrates' conduct in those cases but not in the case of felony jury selection. Accordingly, if petitioner is correct that Article III requires a district court to conduct jury selection regardless of the consent of the parties, the consequence may be that district courts must conduct every civil trial, preside over every misdemeanor trial, and hear every proceeding involving a traffic ticket issued on federal property. Fortunately, Article III is not so rigid as to require such a sweeping and burdensome revolution in the way civil and misdemeanor cases are handled.

1. *The magistrate's conduct in this case did not violate Article III*

As this Court has explained, "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986). In particular, "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts." *Swain* v. *Pressley*, 430 U.S. 372, 382-383 (1977); see *Palmore* v. *United States*, 411 U.S. 389, 402 (1973) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III.").

While Congress has substantial freedom to assign particular matters for adjudication by bodies other than Article III courts, that authority is not unlimited. This Court has identified two instances in which congressional delegation of a judicial function to non-Article III officers transgresses Article III:

first, where that delegation violates a litigant's "right to have claims decided by judges who are free from potential domination by other branches of government," *United States* v. *Will*, 449 U.S. 200, 218 (1980); and second, where the delegation intrudes on "the role of the independent judiciary within the constitutional scheme of tripartite government," *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985); see *Schor*, 478 U.S. at 848. Magistrate-conducted voir dire, however, does not fall within either of those categories.

a. In *United States* v. *Raddatz*, 447 U.S. 667 (1980), this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case. The Court held that the delegation of suppression hearings to a magistrate "does not violate Art. III so long as the ultimate decision is made by the district court." *Id.* at 683. The Court emphasized that "the entire process takes place under the district court's total control and jurisdiction," and that "the magistrate acts as subsidiary to and only in aid of the district court." *Id.* at 681. Justice Blackmun, concurring, reiterated that because the magistrate is subject to the control of an Article III court, "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." *Id.* at 685. Thus, whenever "a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct the errors." *Id.* at 686.

Petitioner argues that Article III was violated in this case because the procedures of the Magistrates Act did not guarantee sufficient review of the magis-

trate's conduct at the jury selection proceeding. The question here, however, is not the constitutionality of the Magistrates Act, but the constitutionality of the particular jury selection procedure used in this case. Thus, if petitioner had requested review of one of the magistrate's rulings and the district court had conducted a searching and careful review of that ruling, the question would be whether that review was sufficiently meaningful to satisfy Article III. Because petitioner did not request any review at all, his Article III claim would have force only if the magistrate's conduct could not have been subject to effective review or control by the district court. That was not the case here.

As in *Raddatz*, the magistrate's role in this case was "subsidiary to and only in aid of" the court. 447 U.S. at 681. A magistrate is a member of the Judicial Branch and is subject to the control of Article III judges. The district judge in this case was free to refuse to assign jury selection to the magistrate, or he could have given the magistrate detailed instructions or a very limited mandate if the parties had requested. Moreover, the parties were free to raise with the district court any objection they might have to the magistrate's rulings. The "ultimate decision" with respect to the jury selection process was the decision whether to empanel the jury. And that decision clearly remained with the district court.[14]

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[14] Petitioner contends in passing (Br. 29 n.12) that if a magistrate conducts voir dire, he holds his office in violation of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, because an officer who performs such a function must be a principal officer of the United States who must in turn be appointed by the President and confirmed by the Senate. Magistrates, however, act under the direction and supervision of the district courts, and for that reason have always been regarded as "[i]nferior officers" that Congress "may allow to be appointed * * * by the Judiciary." *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 342 (1931); *Rice* v. *Ames*, 180 U.S. 371, 378 (1901). If magistrates are "inferior Officers" when they try civil cases and conduct misdemeanor trials, it makes little sense to say that they become principal officers when they participate in a felony proceeding to the extent of presiding over jury selection.

After completion of the magistrate-conducted voir dire, the district court asked petitioner and the government about any "outstanding matters," J.A. 7, and asked "can we proceed with the jury" that the parties and the magistrate had selected, *id.* at 9. Receiving no complaints about the magistrate's supervision of the jury selection or the qualifications of the jurors selected or excused during voir dire, the district court ordered the clerk to "[s]wear [the jurors] in and get started." *Ibid.* The record thus refutes petitioner's assertion that "the judge in [his] trial did not offer to [review the magistrate-conducted voir dire]." Br. 24; see *id.* at 29 ("Nor, in the end, did the district judge conduct any review before swearing in the jury and beginning to receive testimony."). The district court conducted no review because no one asked for it.[15]

Petitioner relies heavily (Br. 24-27) on the Court's statement in *Gomez* that it "harbor[ed] serious doubts that a district court could review [magistrate-conducted voir dire] meaningfully." 490 U.S. at 874. Although we recognize that a district court's review

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[15] Given the availability of constitutionally adequate review by the district court in this case, petitioner errs in contending (Br. 28-29) that the Magistrates Act's failure to provide expressly for such review renders the proceedings in this case violative of Article III.

will not easily capture "the atmosphere of the *voir dire*," *id.* at 875, that is not to say that magistrate-conducted voir dire invariably results in an irreparable distortion of the jury selection process, or that it did so in this case.

To begin with, jury selection often produces no issue needing review, as both sides are often satisfied with the process. This appears to be such a case, since the parties made no objection before the district court to the substance of the voir dire or to the magistrate's decision to seat or excuse particular jurors. In addition, although voir dire requires the court to "scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality," *Gomez*, 490 U.S. at 875, that factor becomes important only if there is a dispute about the rulings made by the officer who presided at jury selection. Here, most of the magistrate's rulings consisted of excusing prospective jurors when, in response to questions, they acknowledged their inability to be impartial. See, *e.g.*, Jan. 6, 1989, Tr. 39-40, 40-41, 50-52, 54-55, 68-69. As we have noted, the only ruling that petitioner objected to before the magistrate was the magistrate's decision to strike for cause a juror who expressed resentment over the drug prosecution of a close friend and gave equivocal answers when asked whether he could abide by the court's instructions. See pp. 19-20 & note 9, *supra*. The magistrate's ruling on that juror was manifestly correct, and it is not surprising that petitioner did not pursue that matter before the district court.

There was likewise no controversy regarding the parties' exercise of their peremptory challenges in this case. One of the important functions of voir dire is to allow the parties to hear the prospective jurors' responses and to exercise peremptory challenges based

on those responses. Like the magistrate's rulings on excuses for cause, the questions that the magistrate asks of the jury panel can be reviewed on the record or on the parties' motions to have particular questions asked. Petitioner did not object to any question posed by the magistrate or request any additional questioning. Again, therefore, there was nothing for the district court to review. But even if such an objection had been made, the magistrate's determination to ask or not to ask a particular question of the prospective jurors could have been reviewed by the district court either in advance or after the fact.

If a need had arisen for the district court to review the magistrate's conduct of voir dire, the district court could have handled the matter in a variety of ways. For example, if the magistrate had refused to ask particular questions that the parties submitted, the district court could have reviewed that issue before voir dire began. Other objections could have been reviewed immediately after the fact or even during the course of the voir dire, either based on the parties' representations or based on the transcript of the court reporter's notes.[16] If necessary, the judge could have questioned a particular prospective juror himself, either immediately after the magistrate's voir dire or even during the course of jury selection.[17] And if the judge had been left in

[16] In this case, as petitioner points out (Br. 2 n.2), the trial judge did not order or review the voir dire transcript. Because petitioner did not object to the substance of the voir dire, including the jurors selected and excluded, the district court can hardly be faulted for failing to order and review the transcript.

[17] In *Gomez*, the Court noted that "as a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at

doubt as to the impartiality of the jury selected by the magistrate, the judge could have commenced the jury selection anew.

In sum, the district court in this case had a variety of means available through which he could have exercised control over the magistrate's conduct of the jury selection process if he had been asked. The magistrate's work was therefore sufficiently subject to the district court's "control and jurisdiction," *Raddatz*, 447 U.S. at 683, to be consistent with Article III. By focusing on the absence of any actual exercise of control over the magistrate in this case, petitioner has confused the *need* for review, of which there was none in this case, with the court's *ability* to conduct review, for which the court had a variety of devices that it could have invoked if the need had arisen.

b. Petitioner's invocation (Br. 30-37) of the separation-of-powers concerns sometimes raised by Article III claims is wide of the mark in the setting of this case. A district court's decision to assign jury selection to a magistrate does not entail any of the separation of powers concerns that this Court addressed in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Schor*, *supra*. A magistrate is an Article III officer who is subject to appointment, removal, and supervision by Article III judges. 28 U.S.C. 631. Moreover, the courts have never been required to assign any task

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trial." 490 U.S. at 875 n.29. That observation, however, was made only in the context of explaining why Congress may not have intended in the Magistrates Act to authorize delegation of voir dire to magistrates. The Court's statement did not address the validity of magistrate-conducted voir dire for purposes of Article III.

to a magistrate; instead, courts have been afforded the choice whether to make such assignments, and they reserve the authority to revoke those assignments at any time. This is therefore not a case of a "congressional attempt[] 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Schor*, 478 U.S. at 850. For that reason, the assignment of jury selection to a magistrate does not amount to a "structural" constitutional violation that transcends the rights of individual litigants. Cf. *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc) (upholding consensual assignment of magistrates to try civil cases, over a claim that the assignment resulted in a structural Article III violation), cert. denied, 469 U.S. 824 (1984).

Petitioner nevertheless argues that having a magistrate preside at voir dire may cause "[a]n erosion of public acceptance of judicial proceedings," since "the public is less likely to respect the outcome where an assistant of the district judge has presided." Br. 35. This is fanciful. Petitioner cites no evidence to support his claim that public confidence in judicial proceedings depends on the presence of an Article III judge throughout the proceedings (or that jurors approach jury selection less seriously when a magistrate conducts voir dire), and those propositions are certainly not intuitively obvious.

To be sure, a judicial officer brings to judicial proceedings, including voir dire, a sense of solemnity that would be absent if the proceedings were conducted by lawyers alone, or perhaps even if the clerk of the court presided. But it is hard to credit the claim that having a United States magistrate, rather than a district judge, conduct voir dire will ma-

terially affect the venire or the public's confidence in the system of justice. After all, both the judge and the magistrate are judicial officers, and both are likely to perform the judicial task at hand with equal solemnity. For that reason, it is not plausible to argue that the assignment of jury selection to a magistrate violates Article III on the ground that it allows Article III judges, solely for administrative convenience, to undermine public confidence in the judicial system, thereby weakening the Judicial Branch in a manner inconsistent with the purpose of Article III.

2. *An Article III right of the sort claimed by petitioner is subject to waiver*

Even if the Court were to conclude, contrary to our submission, that Article III gives a defendant a right to have a district court preside over jury selection, petitioner would not be entitled to relief. This Court has made clear that, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are the other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-849; see, *e.g.*, *Garner* v. *United States*, 424 U.S. 648. 654 n.9 (1976) (defendant can waive Fifth Amendment right to be free from compulsory self-incrimination); *Barker* v. *Wingo*, 407 U.S. 514, 525-528 (1972) (defendant can waive right to a speedy trial); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (defendant can waive right to counsel).

In *Schor*, the Court concluded that "[t]o the extent [the] structural principle [of Article III] is implicated in a given case, * * * notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." 478 U.S. at 850-851. Petitioner, however, may not invoke the *Schor* exception to waiver for structural Article III principles because, as we have noted, district court assignments of certain judicial responsibilities to magistrates are the products of an intra-branch distribution of responsibilities, not "congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Schor*, 478 U.S. at 850. Because a district court's assignment of certain tasks to a magistrate has nothing to do with "the encroachment or aggrandizement of one branch at the expense of another," *Schor*, 478 U.S. at 850, quoting *Buckley* v. *Valeo*, 424 U.S. at 1, the only Article III value at issue—assuming that magistrate-conducted voir dire violates Article III—is "preserv[ing] to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States." *Schor*, 478 U.S. at 850. And that is the purely private interest that *Schor* holds may be waived.

D. Petitioner's Waiver Was Valid Even Though The District Court Did Not Obtain His Personal Consent On The Record

Petitioner's final contention is that even if it was possible for him to waive his right to have the district court conduct the jury selection, any waiver was invalid absent petitioner's personal consent on the record. Because petitioner gave his consent through his attorney rather than personally—in

writing or in a colloquy with the court—he contends that the waiver must be disregarded.

Contrary to petitioner's assertion (Br. 40-47), a party can waive or forfeit his personal right to have an Article III judge conduct a particular proceeding, just as he can waive most other constitutional rights, merely by taking actions inconsistent with an assertion of the protection afforded by the Constitution. See *Schor*, 478 U.S. at 848-849; *Garner*, 424 U.S. at 654 n.9 ("an individual may lose the benefit of the privilege [against compulsory self-incrimination] without making a knowing and intelligent waiver").

This Court has recognized that, as a constitutional matter, "the accused has the ultimate authority to make certain fundamental decisions regarding the case," such as to whether to be represented by counsel, whether to plead guilty, and whether to waive a jury. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring).[18] Nonetheless, the number of such decisions that must be made on the record by the defendant is very small; the requirement of personal, informed consent by the defendant as a precondition to the effective waiver of trial rights is very much the exception rather than the rule, and the exceptions all involve decisions that have sweeping implications for the litigation.

With respect to most rights of the defendant in the criminal justice process, the defendant's attorney is

[18] Statutes and rules require the personal consent of the party as a precondition of the valid waiver of certain other rights. The rules that go beyond the few rights in which this Court has required personal consent for a valid waiver—the right to counsel, the right to a trial, and the right to a trial by jury—are not constitutionally compelled.

authorized to make tactical decisions that result in forfeiture of those rights without the need to obtain a record recital of the defendant's personal and informed consent. As this Court recently explained:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function if every tactical decision required client approval.

Taylor v. *Illinois*, 484 U.S. 400, 417-418 (1988) (footnote omitted). "Under our adversary system," the Court has stated, "once the defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); see *Reed* v. *Ross*, 468 U.S. 1, 13 (1984) ("absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel"); *Faretta* v. *California*, 422 U.S. 806, 820 (1975) ("when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas").

The decision whether to proceed with magistrate-conducted voir dire is not the sort of "fundamental" trial decision that the defendant must make personally. Compare *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (defendant can forfeit, without personal consent, the right not to have members of the venire excluded because of their attitudes toward capital punishment). Decisions such as whether to be represented by counsel, whether to plead guilty, and whether to waive a jury trial are issues that pro-

foundly affect the form of the proceedings, and in that respect they are fundamentally different from a decision such as whether to consent to magistrate-conducted voir dire.

Petitioner argues (Br. 45) that consent to magistrate-conducted voir dire is a "blanket" waiver akin to the waiver of rights that accompanies a plea of guilty. But the suggestion that the waiver of rights involved in consenting to magistrate voir dire is equivalent to the waiver of all of the defendant's trial rights that results from a plea of guilty is a gross overstatement. In fact, there is nothing distinctive about the waiver of the right to the presence of a judge during jury selection that distinguishes it from the myriad trial rights that a defendant can forfeit without any expression of personal, informed consent.

For example, counsel may decide, as a tactical matter, not to cross-examine a key witness against the defendant, or even to refrain from cross-examining any of the government's witnesses, relying instead on a technical defense that does not go to the merits of the government's case. There is no requirement that the defendant be consulted about that decision or that he be apprised of the benefits and risks of cross-examination to make an informed decision whether to waive that right. Similarly, counsel may bind the defendant by deciding not to seek suppression of physical evidence that may be the only evidence against the defendant; there is no requirement that the defendant give an informed, on-the-record consent to that decision, even though the decision may dramatically affect all aspects of the proceedings against him.

That is certainly a sensible result. To impose a requirement of personal and informed consent with

respect to every instance in which a defendant forgoes a possible constitutional claim, or a claim that would significantly affect the proceedings as a whole, would make trials impossibly cumbersome as well as rich spawning grounds for claims of reversible error. Because the waiver of a right to have a district court conduct voir dire is more akin to the waiver of the right to cross-examine a particular witness than it is to the waiver of the right to counsel or the right to a trial, petitioner's consent, expressed through his counsel, should be accorded binding effect in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Article III of the United States Constitution provides in pertinent part:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.
>
> * * * * *
>
> The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury * * *.

Title 28, United States Code, Section 636, provides in pertinent part:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
>
> (2) the power to administer oaths and affirmations, issue orders pursuant to section

3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section, and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a

judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging the conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

> (1) Upon consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. * * *
>
> (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

* * * * *

Rule 51 of the Federal Rules of Criminal Procedure provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice the party.

Rule 52 of the Federal Rules of Criminal Procedure provides:

> (a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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